Property and the right to water: toward a non-liberal commons

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Abstract

This paper examines the turn to considerations of property in arguments regarding the commons and the human right to water. It identifies commitments to liberalism in political economy approaches to property and human rights and develops a matrix for identifying non-liberal conceptions of the commons. The latter hold potential for an agonistic politics in which human rights are compatible with ecological sensibilities regarding the dynamics of conflict and cooperation in complex systems.

Key Words:

Human rights, commons, liberalism, property, water

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1. Introduction

Debate over the human right to water is expanding to include issues of property rights, and this in two ways. In one instance, focusing on property rights is seen as a holding more potential than human rights for "politically progressive strategies" in the sense that, "[e]ffectively realizing human rights…requires the articulation of property rights, water rights and the human right to water" (Bakker 2012: 37). In another more controversial and potentially more litigious view, granting all individuals a transferable property right to water is touted as the best way to accomplish the material and political goals of the human right to water while addressing water security (World Economic Forum 2011). Typically, the material goals of the human right to water center on securing adequate water for the life and livelihoods of all, but particularly of individuals either presently without, or on a trajectory to be deprived of, water (Gleick 1998). However, in view of large-scale uncertainties surrounding human impacts on the global water cycle it is not clear how individual human rights should be scaled (if at all) to complex systems (Vörösmarty et al. 2004; Milly et al. 2008). This is because granting rights to fixed amounts of water carries the risk that the total water claimed under human rights may exceed what is ecologically viable (Eckstein 2010). The political goals of the human right to water are also nuanced, ranging from attempts to arrest oppression, contest neo-liberal privatization trends, address socio-cultural inequities, or to achieve environmental security, protect community values and implement 'watershed democracy' (see Sultana and Loftus 2012; Conca 2006). Many of these broader political goals make appeals to notions of the 'water

commons' and, in this context, this paper considers how increasing attention to property rights affects understandings and appropriations of the commons.

Advocates of the human right to water frequently argue for collective forms of governance under various guises of 'the commons' in order to counter the individualist tenets of property rights or variants of liberalism more broadly. Yet as Bakker (2012) argues—citing a UN report on human rights and access to water and sanitation to this effect (OHCHR 2010)—articulating the human right to water in terms of the commons does not, of itself, eliminate the potential for privatization of water services. Johnston (2003) has questioned the strategy of linking human development, common resources and environmental sustainability to broader structural processes and forces—political, economic and cultural—because in many cases economic success is premised on 'acceptable' tradeoffs with ecological destruction; tradeoffs that are typically ambiguous and often shuttered from contestation. Nevertheless, advocates for the human right to water gain considerable political and moral purchase from appeals to the commons. In this paper, we attempt to sort out why this is so in order to assess how the diverse political aims contextualizing the human right to water variously confront perceived threats while framing governance opportunities in relation to complex and shared water systems.

The paper begins by introducing the field of human rights from the perspective of political economy, drawing attention to the on-going attempts to explain the relationships of individuals to society in political liberalism. The paper then shows how issues of political economy bear on the human right to water in relation to claims about the commons. Next we develop and describe a matrix for understanding multiple (and often competing) accounts of the commons. The

argument developed is that, when considered as a problem of relating parts to the whole, both the political economy of property rights and claims about the commons can be assessed for how they foreground the human right to water in political and normative terms.

The final section of the paper argues that, once construed as a part-whole problem, the distinctions enabled by the proposed matrix can be used to parse out an agonistic conception of the commons. This agonistic approach is based on the idea that competition for water is among adversaries, not enemies, and that what is required is a governance format that compatible with both competitive and cooperative action. Further, this general approach enables an assessment of accounts of the commons for their fit with ecological understandings of cooperation and competition between parts and wholes. Thus, rather than accede to the idea that a human right to water is perhaps best seen as a "strategy" for countering neo-liberal narratives (i.e. Bakker 2010; Bond 2010) we commit to the idea that different forms of collective tenure evident in the commons reflect the ordering power of legal and social norms as an expression of communal agency. This enables a more robust account of the material, political and moral reasons to evoke the sustaining role of water in support of non-liberal forms of life, and versions of the commons built upon them. As such, it unsettles, and opens a space for replacing, the antagonism presumed between independent persons and collective institutions presumed at the basis of many accounts of both property rights and the commons. Further, it opens out onto non-liberal conceptions of the commons.

2. Human Rights

Human rights are "the product of a particular moment and place" (Kennedy 2002), and they represent one expression of what it means to be human. In this regard, it bears noting that the original draft of the Universal Declaration of Human Rights (UDHR) was a transliteration of Henri Bergson's vitalist philosophy (Curle 2007). As such, it carries the vitalist impulse regarding the creative potential of humanity in overcoming environmental limits. Furthermore, these original vitalist claims about 'humanity' were not grounded in claims about the transcendental rationality of the (Kantian) subject but in progressive and creative evolution, a claim other philosophers derided as a "hasty generalization" from evolutionary biology to human destiny (Russell 1929: 21). Nevertheless, human rights retain an ethos of aspiration, a fact not to be confused or conflated with how they are legal aspirations as well – this in the sense that, while claiming legal status, they lack the administering force of the state law (Desmond 1983).[1] As Zaraloudis (2006) makes clear, the essentialist claims uniting legal and philosophic notions of 'humanity' do not allow 'human rights' and material access rights to be equated.

[1] Only international covenants, conventions, protocols and statutes are said to be legally binding and then only for those states that ratify them. So although declarations of human rights may command political and moral attention, they often lack legal significance, not to mention the enforcement mechanisms required to exact commensurate justice with their violations. For instance, the development of a global economy has seen the persistent violation of human rights from various sources, including states (including representative bodies such as military, police or even the courts) and corporations.

The UDHR was passed in 1948, a time since which there has been a persistent effort to avoid essentialist claims about individuals while maintaining claims to universality with respect to 'humanity'. This has led to several debates, of which we only highlight the poles. Shue (1996), for instance, argues that we can secure three basic rights for persons—subsistence, security and liberty—for understanding and contextualizing reciprocal moral, political and economic obligations. While others, such as Teeple (2005), argue that there are no elemental, inherent, or universal aspects to human rights except that they are contextualized by particular modes of production and, as such, are reflective of broader programs in political economy and prevailing relations of property rights.

Given the tension between the fact that any operational human right adheres to a particular person and ambivalence towards essentialist forms of universal definitions of said person(s), human rights can be seen as relative to a given social system and its corresponding political expressions (i.e. the other types of rights already recognized in a given social system and around which social and ecological relationships are ordered). For instance, since other rights are predicated upon it, the most basic human right is that to an adequate standard of living (UDHR, Article 25)—food, clothing, housing and medical care (amongst others). Yet explaining the fit of 'basic rights' implicates theories of how various rights fit together. And in the instance of the UDHR, the basic organizing premises for interpreting human rights are rarely (if ever) referenced to its vitalist roots. Rather, interpretations take their leave from liberalism that, as Watson (1999) argues, is tied to a conceptualization of individuality and rights of non-interference.

The liberal conception of individuals conceives of persons according the ideals of individual autonomy, rational self-governance and as oriented towards achieving happiness. This conception of persons reifies abstract ideals as the basis for defining and protecting rights (Mouffe 2005; Tully 1995, 2008). That is, rights are designed to prohibit collective or interpersonal infringement on individuals based on ideals of autonomy, the rational requirements to sustain that autonomy and the freedom to pursue life projects that respect the same. In this way, communal or collective rights can be seen as threat to, or at very least an infringement upon, an individual's basic rights. This, in strong versions, means that the holder of rights is an individual atomized from the whole. Notwithstanding more nuanced defenses of this tradition (considered below), this atomization cannot be divorced from the historical roots of liberalism that ordered society vis-à-vis *existing* power structures of property rights holders—such as in the right to *not* have slavery abolished because that would infringe on personal property (Losurdo 2011). This history is often masked by arguments that make offerings regarding the rational basis of political liberalism that attempt to free it from considerations of political economy. Yet as Polanyi (2001) has argued, political liberalism and economic liberalism share a push-pull dynamic, where the former may attempt to check the proclivity of the latter towards dis-embedding the economy from society.

The tensions between political and economic freedom, and their corollary challenges with respect to the uneven context in which liberalism emerges, has led to competing explanations of where and how understandings of individual freedom fit with democratic institutions. As Taylor (2003) argues, this debate can be seen as working along two axes. The first is ontological, and has to do with whether ultimate explanations are atomistic or holistic; of whether social goods

result from the aggregations of the parts and properties of individuals (atomism) or whether social goods are concatenations of individual goods (holism). The second relates to advocacy, and of what political primacy is given to individual rights versus communities or "the good of collective identities" (Taylor 2003: 195). The broader liberal-communitarian debate is not the topic of this paper, but Taylor's distinctions are germane to theorizations of the commons that we take up below because these also show commitments of atomism or holism that do not necessarily determine commitments to individualism or collectivism.

Returning to rights and their fit with political liberalism, it is important to not lose sight of the founding violence that established "the rule of law" and within which human rights are made operational (cf. Derrida 2002). This violence was not oriented haphazardly. Rather, it was and remains coincidental with the capitalist mode(s) of production that characterizes contemporary western economic and governance systems. And is evident in the enforcement of particular kinds of property rights that support those systems, the legitimized violence that accompanies these support systems, and that which justifies their effects on social-ecological landscapes (see Blomley 2003; Delaney 2010). As Pieterse (2007: 797) argues,

> "the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo…phenomena such as 'rights' and 'the state' legitimize a collective experience of alienation (or suppression of a desire for connectedness) while simultaneously denying the fact of the experience."

In this context, Teeple (2005: 21) highlights a corresponding worry for human rights when he argues that,

> "The human in the context of human rights, then, is nothing but the way the human appears in a society based on contractual relations; it is the human defined as isolated individual, as whole unto itself, as singularity, as an unrelated atom; it is not the human as a social being, as a product of social relations, whose chief characteristic is relations to others".

This emphasis on self-governed individuals, whose relations are mediated by property rights congruent with prevailing modes of production, distribution and consumption has intensified under the era of neo-liberal economic globalization. Neoliberalism diverges from classical liberalism's attribution of rational economic behavior to human nature by imploring legal and economic interventions as part of a broader political rationality so that individual actions are constructed, maintained and reproduced not only by the rule of law and political institutions, but also the social relations that are a product of, and ultimately conform to capitalist modes of production (see Brown 2003). Indeed, as these forms of political rationality become more pervasive, they normalize diverse forms of social relations while winnowing away at competing, democratic forms of social reproduction. As Gill (1995: 399) writes,

> "The present world order involves a more 'liberalized' and commodified set of historical structures, driven by the restructuring of capital and a political shift to the right. This process involves the spatial expansion and social deepening of economic liberal

definitions of social purpose and possessively individualist patterns of action and politics."

It is the case that many types of rights are abstract in the sense that, beyond sentiments of ideals and aspirations, unless one has the means to exercise a right in question, that right may accomplish very little. Nevertheless, rights have the ability to affect peoples' life prospects by virtue of how their means may be legitimately directed. In other words, in a world of legal abstractions, it is not a right that satisfies a need but rather a mutually dependent combination of the means to achieve said right which in turn make claims and entitlements practical and realizable (Teeple 2005). Yet as macroeconomic reform seeks to enclose ever more resources in the process of capital accumulation and wealth generating opportunity (Wallerstein 2011), the drive for material abundance pits individual rights holders against one another in a perpetual competitive struggle over scarce resources. As such, the relationship amongst individual rights holders is conceived of as antagonistic and, when amended under neo-liberalism, the manipulation of social relations is itself a legitimate means of wealth protection and generation.

The uneven socio-political basis of rights holders is also part of what gives "human rights" a hopeful dimension *within* political liberalism insofar as it holds an aspiration toward conceiving of rights in terms that arrest and address uneven material conditions without compromising the ideals of individual liberty. This is the case in accounts that seek political legitimacy without reference to existing power structures, such as in Rawls' (2001, 2005) "original position" and his claims regarding justice as fairness, and Habermas' (1996) arguments regarding the co-original nature of normative and political legitimacy. These theorists highlight

how, rather than extending uneven social and material realities, liberal ideals may support accounts of rights and the task of achieving just political institutions in the context of balancing individual equality and social limits.

Despite the theoretical promise of political liberalism to curtail uneven power relationships that rationalize the lifeworld through economic structures operating 'behind the backs' of citizens (cf. Habermas, 1996), there are reasons to question whether this is not accomplished at the expense of alternate forms of life. This has been the target of Mouffe's (2005) criticisms regarding the failure of liberalism to account for the pluralistic nature of the social world itself and the genuine antagonisms that persist regarding *which* social world individual liberty operates in reference to. Tully (1995, 2008) has also drawn attention to the 'strange multiplicity' of modern constitutional states and the need to give an account of social pluralism that does not require conformance to liberal versions of the world as a condition for political participation. Such criticisms reveal several problems in interpreting human rights through abstract ideals of liberalism and which also, as is argued below, come to bear on interpretations of the commons. First, there may be a propensity to further engrain conceptions of individual autonomy that do not fit with the lived experience of those over whom such ideals are extended. Second, human rights may suppress alternative ways of solving similar social problems such that the "equal possession of rights" is actually incongruous with fair "means to realize them" (Teeple 2005: 22). Third, and critically for the issue at hand, the relationships between individuals and the sum-total of their claims may be characterized prior to, or in the absence of, the empirical constraints imposed by limited and shared resources: such as water.

In sum, the predominance of individual rights to private property in economic modes of production forms the dominant conception of social relationships for human rights. Further, just as the liberal ideals of property connote relations between people with respect to things (not between owners and the object of property), so too do liberal definitions of human rights suggest that individual rights can be discharged through the balance of individual claims against collective infringements based on a commitment to abstract ideals about the human person; That is, relations are between individuals and an ideal, not between concrete others. But this is highly unsatisfactory to those who do not wish to support liberal forms of life and who may augur for an alternate rights framework for expressing and mediating relations between members of a community and their environment. The latter forms of rights are by definition relational, not abstract. Yet, as is considered next, what takes precedence in the liberal definition of the human right to water is the amount of water needed to satisfy exclusive individual interests. In this way, as Linton (2012: 48) points out, "the human right to water, as usually stated, fixes a relation between the individual human body and a quantity of water."

2.1 The human right to water

In July 2010, the United Nations General Assembly voted to approve a draft resolution on the human right to water and sanitation. This was set against the very real backdrop of over 1 billion persons who lack access to safe water and 2.6 billion who lack access to basic sanitation (UNDP 2006). Although previously implied under the 2002 UN General Comment No. 15—the International Covenant on Economic, Social and Cultural Rights created a mechanism for interpreting water as necessary to pursue other rights—the formal right was long debated. Since

the late 1990s, water experts had been developing metrics for defining a human right to water so as to avoid conditions of absolute water scarcity, with estimates of adequate clean water at between 30-50 litres of water per person per day (Gleick 1998). A second impetus was to address the trend towards the privatization of water services in less developed countries, where governance programs carried the potential to curtail access to water short of the universal aspirations of the UDHR (see Dellapenna and Gupta 2008).

As the debate over the human right to water evolved, it was unhelpfully cast as a matter of public versus private rights to water. Those wary of making water an individual human right pointed out the empirical problem that would exist if the aggregate of individual rights outpaced actual water availability either by population growth, natural variation or climate change (Eckstein 2010). Likewise, arguments that the human right to water was a 'public' right accruing to communities sought to foreclose on private service delivery options, even though they did not wholly escape this possibility (Bakker 2007). As the debate developed, anti-privatization efforts consolidated around the idea that water is a 'commons.' And this created a conceptual stalemate. On the one hand, the 'human right to water' was declared part of a 'commons' in order to protect public goods. On the other, discharging the human right to water, as Ban Ki Moon noted shortly after the declaration on the human right to water and sanitation was passed, did not prevent private options for delivering public goods. Such a scenario was forecast and remarked on by Bakker (2007, 2012).

Amidst the private/public debate over the commons were more nuanced accounts of what

was at stake in the deployment of a predominantly liberal conception of self-governance. These drew attention to how protecting substantive claims to water under any single regime required the conformance of pluralistic conceptions of social and interpersonal relationships to fit one model of rights. This worked from two directions. The first countered the view that all rights are reducible to property rights through recognition that creating private rights can dispossess or otherwise deny certain customary rights (Swyngedouw 2005). The second, as Meinzen-Dick and Nkonya (2005: 11) suggest, was that codifying rights under the liberal state and universal conditions of 'equality' could create uneven outcomes with respect to water,

> "Codification of rights does not allow for consideration of special circumstance, such as basic livelihood needs, that are given substantial weight in customary systems. This is partly due to limitation of state capacity to interpret individual circumstance, but it also derives from current emphasis on the 'rule of law', which implies that everyone should be treated equally, without special considerations".

The liberal vision of freedom, as highlighted above, may be questioned when it is incongruous with moral and political norms that *already* fit individual claims to an alternate conception of the social world. This is especially the case when that world does not conform to self-constituting explanations of the state or 'the rule of law' and may, in fact, seek to confront the very idea of the liberal state itself. Conflicts of this type arise when sources of normative and legal legitimacy other than the state are declared illegitimate, either *ex cathedra* or through colonial violence. For instance, the lack of legal recognition of indigenous water rights of First Nations in Canada is directly linked to the interpretation of claims to water in Eurocentric law

and is, *ipso facto*, a denial of the source of legal sovereignty held by First Nations (Phare 2009). In the Canadian case, as elsewhere, the denial of alternate sources of legitimacy for water rights are often tied to broader claims regarding political economy and the historical violence underlying property rights. As Wilkinson (2010) shows from U.S. court decisions, property development premised on the denial of indigenous water rights has even be used to stop legal challenges so that "non-Indian expectations" are not disturbed.

The foregoing discussion can also be seen as one of how Taylor's (2003) atomism-holism and individualist-collectivist distinction bears on considerations of the human right to water. In the first case, when a liberal conception is universally extended based on atomistic properties of individuals (i.e. rationality, autonomy), claims regarding 'the commons' have little substantive differences with private rights because both operate on similar accounts of the individual (Schmidt 2012). By contrast, proponents of 'the commons' frequently argue that individuals self-identify in holistic terms and in relation to the communities they are a part of (Brown 2008). In the second case, as Mitchell (2012) has argued, the question of property rights requires examination alongside arguments regarding the human right to water because of entanglements with political economy. Here the social relations of property rights bear on whether *other* resource rights are designed to give primacy to individual or collective goods. In what follows, we offer a matrix for clarifying amongst different appeals to 'the commons' with the aim of considering how the human right to water may be understood through lenses other than liberalism.

3. The water commons

Incorporating water as part of the commons represents one potential (and popular) strategy for resolving part-whole concerns regarding human rights. However, a single commons framework does not presently exist, although various appellations seek to counter neoliberal trends toward deregulation, liberalization and privatization. Part of the shared foci may be to confront what Blomley (2008) describes as a 'liberal-economistic model' that animates the 'analytical and political imagination' in property structures that work on a binary model of private versus state ownership. Blomley (2008) makes the case that there is a strong political and moral basis to the 'commons' that may counter the public-private binary and form a new category of legitimacy for common property. In practice, the potential spectrum for political or moral norms is very large given the diversity of ways available to define communities and articulate their normative significance (see Mason 2000). Here we argue that the human right to water can be understood more clearly when accounts of 'the commons' are identified according to how they incorporate both political advocacy and moral legitimacy.

Table 1 presents a tool for assessing different variants of 'the commons' in reference to the distinction between atomism/holism and individualism/collectivism as they relate to issues of moral legitimacy and political advocacy. As we argue in the next four sub-sections, this matrix offers the opportunity to assess different approaches to the moral and political basis of the commons in terms of how they affect interpretations of property rights. In so doing, the matrix can be deployed for a more ambitious aim, which is to help distinguish where and when appeals to the commons come into contact and/or conflict with abstract ideals of human rights, such as those noted above.

[Insert Table 1 here: currently attached separately after the list of references]

3.1 Common property

The contemporary recovery of 'the commons' began with Hardin's 'tragedy of the common's' thesis and the idea that individuals are locked into selfish and rational games of utility maximization that, when pursued collectively, undermine the resource base and lead to collapse. Responses to Hardin's account, most notably by Ostrom (1990), showed several flaws with his assessment and offered an alternate account to show that his arguments were aimed at 'open access' resources and not those where at least some communally sanctioned rules curtail individual behavior short of communal demise. In other words, as Blomley (2008: 318) points out, "a commons property regime is operative when a resource is held by an identifiable community of interdependent users, who exclude outsiders while regulating internal use by community members." Initially, accounts of the commons borrowed on the idea of 'common property' where rights were conceived of as "*private property for the group of co-owners*" and where "…the difference between private and common property is not to be found in the nature of the rights and duties as much as in the number to which inclusion or exclusion applies" (Bromley 1991: 25, 29 original emphasis).

On the common property account, the individuals who populate the commons are legally no different than private individuals and this individualism provides the basis for the corporate rights of the community. This version of the commons, however, was criticized by Agrawal

(2003) for assuming that 'sovereign subjects' came ready-made for rationally navigating governance institutions. A second part of Agrawal's critique cited the lack of attention to power dynamics in governance institutions themselves. Together, these critiques served to sharpen unease about tying accounts of the commons too closely to the assumptions of private property and its ontological claims regarding self-governing individuals. It also raised questions regarding whether institutions governing the commons were not oriented more towards collectivist strategies. These types of concerns prompted a shift away from explaining the commons in terms of common property and towards explanations of 'common-pool resources'.

3.2 Common-pool resources

The common property account has significant shortcomings because, in some cases of the commons, property claims were non-existent, or if they did exist, were not always recognized by formal legal arrangements (Feeny et. al. 1990). To address this, the literature shifted towards the notion of 'common-pool resources' (CPR) by distinguishing between "the nature of the good (common-pool *resources*) and a property regime (common-property *regimes*)" (Hess and Ostrom 2003: 118). This distinction enabled an assessment of how the production function for a given resource unit (i.e. water) operates in reference to shared governance practices without conflating this production function with the allocation function of a particular rights regime (Ostrom, 2003). In so doing, CPR retained its atomistic commitments but shifted the orientation of institutional structures towards advocating for collective rather than individual success. In this sense, and as Ostrom (2005) argued, agent behavior can still be explained by modified rational-choice theory, but behavior is interpreted in terms of how individuals seek not only to navigate social structures,

but also to support long-term institutional viability. In this modified rational-choice explanation (and the game-theoretic assumptions it incorporates), CPR has higher requirements for political integration because individuals are required to navigate similar social structures in similar ways.

Although accounts of CPR see individuals in relation to social structures, individuals are not defined through them. As such, governance institutions retain their atomistic orientation with the modifications to rational-choice theory moving towards political advocacy for collective goods, such as the preservation of social structures themselves. In so doing, 'common-pool resources' also retain the notion of individual self-governance as the basis for rights regimes, and this account can be troubled by non-western views towards the self (and others) with respect to resource rights (Schmidt and Dowsley 2010). As a result, the priority assigned to individual rationality requires CPR to premise political integration on a theory of reasoning rather than on the actual claims or social rules that govern shared resources. Thus, rather than have individuals defined as members of a community, CPR holds that the commons represents the pooled interests of individuals who view the most rational route to securing shared institutions as curtailing self interest in favor of social success.

3.3 Legal Pluralism

The atomistic-collectivist claims of CPR contrast with those who question whether such accounts go far enough in helping to arrest the basic inequalities that may characterize existing social structures that govern the commons. For instance, Zwartveen and Meinzen-Dick (2001) argue that oppressive gender norms are not fully confronted without situating the differential

rights to water between men and women within the multiple spheres of social values that legitimate them. The alternate suggested is not to understand rights regimes in the commons through explanations that ultimately rely on the properties of individuals but on a holistic conception of individual goods. Under this model, legal pluralism offers accounts of the commons where individuals can avail themselves of different spheres of value that form the basis not only for political advocacy but also different kinds of rights. For instance, Pradhan and Meinzin-Dick (2003) show how multiple sources of legitimacy from religious, state, international, project, or local norms can overlap in particular cases in which claims to water are contested.

In models of legal pluralism, claims to the commons have relatively low requirements for political integration because overlapping spheres of value (i.e. religious, customary) are not presumed to be reducible to each other. That is, individual goods are holistically tied to multiple different spheres of value and these goods may be secured by marshalling any number of the appropriate spheres of value, such as those of religion or custom, that support political advocacy for rights. Importantly, the use of countervailing arguments is not dependent on the properties of individuals, such as whether their appeals fit criteria of rational choice theory, but on the ability to define the individual good in relation to various value spheres that make that good worth protecting, such as appealing to state law to overcome gender discrimination in customary rights. From this perspective there are important reasons to be cautious in the formalization of claims, since the sphere of value (i.e. state, religious or international law) used to entrain rights can close off particular options for individuals in the commons (see generally Benda-Beckman et al. 2006). Critically, however, legal pluralism can be interpreted as advocating for the individuals, or

concatenations of oppressed individuals (i.e. women), who seek rights. In this sense, claims to the commons are not necessarily oriented toward the good of existing versions of collectivities themselves, since these may be premised on uneven power relationships or spheres of values that favor certain groups based on, for instance, gender, caste or class. Rather, collective sustainability is an outcome of institutional protections that enable particular individuals to pursue their own good along with others who do the same.

3.4 Moral economy

Like legal pluralism, accounts of the 'moral economy' of the water commons presume upon the social good being the "concatenation of individual goods" (Taylor 2003: 195). Unlike accounts of legal pluralism, however, claims regarding the 'moral economy' of the commons identify how policies and norms give primacy to community life or collective goals. This notion of communal legitimacy conceives of rights as being subject to communal norms that are broadly held and consistently applied. As Trawick (2010) has documented, these types of arrangements for governing the commons have high requirements for political integration because all claims to the commons require adhering to the same set of norms and the same values. Thus, the difference between accounts of legal pluralism and those of moral economy lies in the degree to which competing spheres of value affect actual decisions regarding water. In accounts of the moral economy of water these norms are intrinsic to the group, but may also hold for principles that are consistent across multiple types of organizational systems. For instance, Trawick (2010) identifies common rules for successful water management in Peru, Mexico, Spain, India, Nepal, Bali and the Philipines: communal autonomy, contiguity in water provision, uniformity among

rights, proportionality among rights, and the regularity and transparency of applying and maintaining communal infrastructure and institutions.

In light of the holist-collectivist position of moral economy approaches to the commons, and the higher degree of political integration this entails, it is not entirely surprising that such arrangements issue from smaller scales. Nonetheless, there is increasing evidence that scale alone is not a determining factor for pursuing this agenda. As recent work by Boelens et al (2010) reveals, larger communities have effectively pursued similar goals at the state and national levels based not so much on uniformity *within* the community but on shared commitments against the imposition of *external* forms of governance, particularly the individualist programs of neo-liberal water policies. These instances of resistance are *not* based on countering abstract ideals with alternate forms of abstract rights. Rather, they appeal to alternate sources of legitimacy that, at least in some cases, stand against those of the state and proclivities towards forms of property that do not respect alternate, often communal, tenure arrangements. As such, they do not fit neatly within a model of legal pluralism because they are not countering one sphere of value (i.e. state law) with another. Rather, they are countering one form of life, and its attendant social relations, with another. Furthermore, they do not present as the *kinds* of rights that fall within the purview of political liberalism because they seek to confront the very idea that standardized, abstracted rights, adequately reflect how individual goods support community life or the collective good.

4. Discussion: the commons' matrix

When distinctions between atomism/holism and individualism/collectivism are applied to various accounts of the commons, it becomes clearer that the many different types of communal arrangements that accounts of the commons seek to explain are not equal with respect to how the human right to water is expected to fit with other rights, such as those to property. For instance, atomistic views typically appeal to abstract standards of rationality to explain individual behavior and, as a consequence, tend to see rights as 'strategies' for procuring benefits without undermining shared resources. Alternately, the methodological individualism of atomists can be rejected, along with the utilitarian metrics of success it entails, by noting how many water doctrines are *already* grounded in norms oriented to support the community (see Schmidt, 2012). Sax (1994: 15), for instance, has shown how doctrines of appurtenance that tie water claims to land tenure systems—from private property to interstate law—that issue from recognition that "water in place is a type of wealth." As Sax notes, this of course returns us to the question of *which* community's wealth is considered relevant in a particular place. This issue notwithstanding, once viewed as an issue of an *existing* (i.e. not abstract) community, many water norms are not an easy fit with property rights either in terms of social goals or their cumulative effect on ecological systems (Butler 2000). In the case of collectivist explanations, then, the 'economistic' imagination of the purpose of rights can be countered, as it is by many indigenous conceptions, by seeing rights as "a bundle of relationships rather than a bundle of economic rights" (Shiva 2001: 46).

One complaint regarding 'collective' explanations of the commons is that the notion of the 'community' underlying them is too ambiguous, and that in fact many communities simply do not have the capacity or the wherewithal to effectively govern water (Bakker 2008, 2010). In

the case of the human right to water, however, what is at stake is not only this problem. Rather, what is at stake is both how and whether *existing* (and yet-to-be-developed) governance institutions should be oriented with respect to relationships amongst different goods. That is, the question is also whether governance institutions should hold norms that conform to rights in a way that grants primacy to individual rights and freedoms or to collective goods. As such, the claim that 'community' is too ambiguous draws out issues of moral legitimacy but, on the matrix developed here, leaves issues of political advocacy somewhat unclear.

A final issue, and one that occupies the remaining section of this paper, is how a more nuanced approach to the political economy of the commons actually fares with respect to preventing degradation to the resource base. In this sense, one key feature of the proposed matrix is that it allows us to extricate accounts of the commons that do not continue the trend of securing rights according to abstract ideals of rationality, autonomy or private rights in favor of anchoring explanations in norms that are potentially congruent with ecological values because they are rooted in actual social and ecological relations. This implicates a large task of rethinking existing cases with the above distinctions at hand, and one that this paper cannot undertake in full. But there are grounds to pursue this issue given similar problems in ecology regarding how part-whole relationships variously work to support both individual goods and those of species. What is required, however, is to step away from liberal conceptions of rights and to rethink part-whole relationships within a commons framework that does not presume the basic issue at stake is the resolution of antagonistic claims to water but a dual dynamic of competition and cooperation.

5. The human right to the 'water commons' without liberalism

There is no mention of collective rights in the UDHR, save Article 29: "Everyone has duties to the community in which alone the free and full development of his personality is possible." In this way, human rights are endowed and exercised in such a way that is consistent with the liberal tradition whereby the conception of community begins and ends with the individual (Watson, 1999). As such, here we ask: are human rights compatible with indigenous or other forms of rights to common resources, such as those that adhere to communities? There are interesting proxy arguments, such as those found in the European Union's (2000) Water Framework Directive, which is as a "framework for Community action in the field of water policy." The reinvigoration of communal agency, and the conceptualization of "others" with respect to *existing* legal norms, has been furthered in recent work on environmental law (see Kysar 2010). Further, the orientation to communal agency has been given a pragmatist defense by Norton (2005) who argues that, once methodological individualism is jettisoned, space opens up for pluralistic approaches to values and political action that may be positioned in reference to the goods of human and ecological communities. In this way, attending to communal agency presents an alternate route to recent attempts to fit explanations of 'the commons' that maintain fidelity to accounts of individual rationality to social-ecological systems (contrast Ostrom 2007, 2009).

The foregoing arguments suggest that we can move away from accounts of the commons that are grounded in liberal assumptions about persons, rationality and the maximization of resources in patterns of political economy. To do so we might confront the basic antagonism

presumed between the individual and the community and reject the notion that the aim of a 'human right to water' is to protect the independent rights of persons. Rather, we can begin with interdependent persons as part of an interdependent whole and replace an antagonistic disposition with an agonistic one, where competition is among adversaries, not enemies.

One place to anchor an agonistic conception of the commons and the human right to water is in models of complex systems ecology. There, as Leopold (1966: 238) eruditely stated, "[p]olitics and economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by cooperative mechanisms with an ethical content." This view, as is well-known, ultimately leads Leopold to make an ecological shift where ethics are a mode "community instinct" for guidance under conditions of uncertainty, such as those currently pervading concerns regarding global hydrological variability and human rights (cf. Milly et al. 2008; Eckstein 2010). More recently, Tully (2008) has offered an ecological ethic in line with an agonistic conception of politics. Tully notes that the global economic system is itself an open network, and able to be disturbed in multiple ways by civic politics. He then grounds an ecological ethic in an agonistic politics where the on-going negotiations of practical governance systems work to reach decisions in the here and now without extending those norms indefinitely.

An agonistic commitment to reciprocal political agreements holds potential to link to the non-equilibrium paradigm of ecology in which the uncertain and changing nature of systems troubles basic assumptions of law and its orientation towards reaching 'finality' (Tarlock 1993). It does so by reorienting the *kinds* of social relationships that legal norms are charged with protecting away from those of capitalist modes of production and towards those compatible with

our growing ecological knowledge. As we argued for above, the political economy of resource rights holds a basic antagonism between individuals with respect to the objects of property, hence the purpose of law is to reach a final decision on the rights of competing parties. But in the real economy of social-ecological systems many resources are shared and the consequences of different uses interdependent. This is especially so in the case of water. As such, moving in the direction of green property can provide an ecological therapeutic for law (i.e. Byrne, 1990). The view we are setting out requires further development, particularly with respect to the particular ways that social and economic rights are *already* embedded in political and moral communities that depend upon water, and issues of identity and the relation of individuals to the law in agonistic politics (see respectively, McManus 2008; Tully 2003). As Freyfogle (1996) suggests, it is critical to recognize that water holds multiple values within different communities that cannot fairly be reduced to a single scheme of rights. By shifting towards an explanation compatible with complex systems ecology, however, diverse kinds of communities can be supported through arguments regarding how part-whole relationships amongst persons are one expression of the evolutionary communities supported by Earth systems (i.e. Wheeler 2006). Thus, aside from where we may fall in terms of ultimate explanations regarding whether individual goods are atomistic or holistic, political advocacy for the water commons may be oriented to the practical systems affected by human actions and of which humans are an interdependent part.

Agonistic politics directly confront conceptions of persons who are autonomous and abstracted from social relations, and which provide no substantive arguments for getting them into social or environmental relationships without stipulating that the goal and end of any system

of rights is to maintain the kind liberty that exists under prevailing modes of production. That is, systems where there has been an exchange of the right for the good and where political participation is considered fair by virtue of procedural rules rather than being oriented towards mechanisms that respect alternate accounts of the good or the forms of life that support them. By contrast, the agonistic conception favors substantive claims where persons begin as interdependent members of an interdependent whole. This substantive turn also presents a robust option for confronting the institutions of liberalism (including neo-liberal economics) because the goal of social policy is not to remove barriers to the free pursuit of liberty but to ensure that the conditions upon which competition to resources depend are not structured so as to produce winners and losers, but an indefinite field of fair play. Evidence of such systems exists under multiple types of arrangements that the term 'commons' serves to heuristically identify. Underlying the heuristic, however, are diverse sets of values, notions of identity, governance arrangements and social-ecological conditions that offer alternate worlds in which to *internalize* claims regarding the human right to water. Recognizing the differences between these worlds—and the variants of the commons they imply—is critical for assessing arguments that seek to reconcile human rights with practical systems of governance. It is also critical to understanding why claims to the commons maintain political and moral purchase despite theoretical arguments regarding their fit with liberal notions of property.

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Rights regimes in the commons

Moral basis of individual goods		**Political advocacy: *Individualist***	**Political advocacy: *Collectivist***
	Holist	Legal Pluralism	Moral Economy
	Atomist	Common Property	Common-pool Resource Theory

Table One: Rights regimes in the commons.